prior Commission filings, see Attachments 2-5, there is no evidence in section 272 or elsewhere in the Act that Congress intended that provision to be a statutory safe harbor that would guide RBOCs to the creation of entities that would enable them to evade their obligations under section 251(c). Therefore, an ILEC affiliate, including one that provides advanced services, must be deemed a successor or assign to the ILEC under section 251(h) unless it complies not only with the separation, nondiscrimination, and disclosure obligations imposed by section 272, but with additional conditions necessary to establish that it is truly no longer a successor or assign of its parent.

Bell Atlantic has not come close to making this showing. Indeed, Bell Atlantic's proposed affiliate would not even begin to comply with the requirements of section 272, let alone satisfy the higher standard that properly should apply. Given the limited time allowed for comments on Bell Atlantic's proposal, AT&T cannot provide a comprehensive analysis of the detailed merger conditions imposed on SBC/Ameritech and the requirements of section 272. But even a preliminary examination reveals many ways in which the merger conditions fall far short of ensuring that the separate data affiliate will comply even with section 272.[22]

First, the SBC/Ameritech Order expressly exempted SBC/Ameritech from complying with certain subsections of section 272, and provided that even those sections which it did incorporate by reference could be disregarded to the extent they were inconsistent with the conditions. See

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[22] Bell Atlantic's December 10th letter is silent (as it is on so many crucial points) as to whether it contends that an advanced services affiliate that complied with the limited set of conditions Bell Atlantic proposes could provide in-region interLATA services. Section 272 unequivocally provides that a BOC may not originate any interLATA telecommunications service other than those specifically enumerated in section 272(a)(2)(B), unless it complies with the separation and nondiscrimination requirements imposed by that section. See also 47 U.S.C. § 271(d)(3)(B). A BOC "advanced services affiliate" thus plainly may not provide xDSL services on an interLATA basis unless it complies with the full panoply of section 272 requirements.

SBC/Ameritech Merger Order, App. C, ¶ 3 (affiliate need only comply with subsections 272(b), (c), (e), and (g), "except to the extent those provisions are inconsistent with the provisions of this Paragraph," to presumptively escape being a "successor or assign").

Second, the conditions would sanction conduct that squarely violates section 272, as described below.

Sharing of operation, installation, and maintenance ("OI&M"): Bell Atlantic's affiliate proposal promises to breach a core component of section 272 – the prohibition on sharing operation, installation, and maintenance ("OI&M") functions. Section 272(b)(1) requires affiliates to "operate independently" of a BOC. The Commission's Non-Accounting Safeguards Order ruled that this provision imposes independent substantive requirements that, among other things, preclude a BOC and its section 272 affiliate from "performing operating, installation, and maintenance functions" for each other's facilities.[23] That order went on to observe that "allowing the same individuals to perform such core [OI&M] functions on the facilities of both entities would create substantial opportunities for improper cost allocation . . . . Allowing a BOC to contract with the section 272 affiliate for operating, installation, and maintenance services *would inevitably afford the affiliate access to the BOC's facilities that is superior to that granted to the affiliate's competitors. Id.* ¶ 163 (emphasis added). Despite these unequivocal findings, the merger conditions that Bell Atlantic wishes to follow clearly would permit it to share OI&M services with its advanced-services affiliates, subject only to the limitation that such services are (in *some* cases) to be made

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[23] First Report and Order and Further Notice of Proposed Rulemaking, Implementation of Non-Accounting Safeguards of Sections 271 and 272 of the Telecommunications Act of 1934, as amended, CC Docket No. 96-149, FCC 96-489 (released Dec. 24, 1996), ¶ 157 ("Non-Accounting Safeguards Order").

available to CLECs on a nondiscriminatory basis.[24] SBC/Ameritech Merger Order, App. C, ¶¶ 3-4. At bottom, the proposed OI&M services between Bell Atlantic and its affiliate necessary lead to such business entanglement that they are inherently discriminatory. Because the merger conditions would permit far more integration between Bell Atlantic and its advanced services affiliate than is permitted under section 272, Bell Atlantic's proposal improperly seeks to permit its affiliate to escape its obligations under section 251(c).

The SBC/Ameritech Merger Order attempted to explain the Commission's decision to permit SBC/Ameritech to share OI&M functions with its advanced services affiliate. However, that explanation, which covers only a single paragraph, does not even purport to address the fundamental problem identified in the Non-Accounting Safeguards Order -- the fact that OI&M sharing "would *inevitably* afford the affiliate access to the BOC's facilities that is superior to that granted to the affiliate's competitors." The SBC/Ameritech Merger Order explained the Commission's decision to allow OI&M sharing as follows (¶ 473):

> Although the conditions permit SBC/Ameritech and its affiliate to share operation, installation, and maintenance (OI&M) services, we do not find that such sharing will confer upon the affiliate an unfair advantage in the provision of advanced services. We reach this conclusion for several reasons. First, although sharing of these services is permitted, the conditions also provide that such services will be made available to unaffiliated entities on a nondiscriminatory basis. As such, there should be no difference in price or quality between the OI&M services provided to the affiliate vis-a-vis unaffiliated entities. Second, although we recognize that in the section 272 context the Commission prohibited the sharing of these functions, we do not find such a prohibition to be required in the advanced services context. For example, because the loop is used to provide both telephone exchange services and advanced services, greater network integration is required in the provision of

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[24] Under its proposal, Bell Atlantic could provide some forms of OI&M on an exclusive basis. See, e.g., SBC/Ameritech Merger Order, App. C, ¶ 3.c(3) (BOC may provide "network planning, engineering, design, and assignment services" to affiliate on an exclusive basis for 6 months); *id.* ¶ 3.h (BOC may receive and process trouble reports and perform trouble isolation for affiliate on an exclusive basis for 12 months).

> advanced services than in the provision of long distance services. Given this, allowing the SBC/Ameritech incumbent to share these services with its affiliate, on the same basis that it shares them with unaffiliated entities, will permit greater economies of scope and enable the affiliate to be a more efficient competitor. Third, as described above, the merger conditions require a rigorous internal compliance program and annual audits. We believe that these mechanisms will adequately deter SBC/Ameritech from favoring its affiliate in the provision of OI&M services (as well as other services).

None of the three reasons the order offered bears at all on the rationale underlying the Commission's earlier finding that a BOC affiliate would inevitably have superior access to OI&M services provided by the BOC. The SBC/Ameritech Merger Order first pointed to the merger conditions' imposition of a nondiscrimination requirement. But section 272(c) itself imposes what the Commission has called an "unqualified prohibition against discrimination by a BOC in its dealings with its section 272 affiliate and unaffiliated entities,"[25] and the Non-Accounting Safeguards Order nevertheless found that prohibition could not adequately protect CLECs. And the Non-Accounting Safeguards Order's finding came in spite of section 272's strong transaction disclosure and audit safeguards, which the Bell Atlantic proposal omits entirely. The SBC/Ameritech Merger Order simply offers no reasoned basis to presume that the SBC/Ameritech conditions' nondiscrimination provisions can adequately protect competition when section 272(c) cannot do so.

The second ground on which the SBC/Ameritech Merger Order sought to permit SBC/Ameritech to share OI&M was that "greater network integration is required in the provision of advanced services than in the provision of long distance services" and that therefore OI&M sharing will permit a BOC to enjoy "greater economies of scope." This rationale, however, also utterly fails to address the fundamental holding of the Non-Accounting Safeguards Order. A BOC's opportunity to achieve economies of scope bears no relation to its ability to discriminate against

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[25] Non-Accounting Safeguards Order, ¶ 197.

unaffiliated entities. Indeed, to the extent that advanced services require greater "network integration" than do interLATA voice services (a point the SBC/Ameritech Merger Order fails to support in any meaningful fashion),[26] then it stands to reason that the ability of a BOC to discriminate in favor of its affiliate when providing OI&M services would be even harder to detect and deter,[27] and would pose an even greater threat to competition.

Third, the SBC/Ameritech Merger Order's attempt to rely on the conditions' so-called "rigorous internal compliance program and annual audits" is plainly inapposite to Bell Atlantic's proposal, which does not incorporate those elements of the conditions (assuming, *arguendo,* that those safeguards could otherwise overcome what the Non-Accounting Safeguards Order found were intractable problems of detection and deterrence). The SBC/Ameritech Merger Order also conspicuously fails to make any detailed comparisons of the section 272 requirements and the merger conditions in this respect, and it is far from self-evident that the 1996 Act's transaction disclosure and audit provisions, coupled with the Commission's rules interpreting section 272, are any less "rigorous" than the SBC/Ameritech conditions -- particularly given that the merger conditions' audit standards have yet to even be drafted.

Nondiscrimination: While section 272(c) unconditionally prohibits discrimination "in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards," Bell Atlantic's proposal would permit it to discriminate in favor of its affiliate in

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[26] The sole grounds the SBC/Ameritech Merger Order offers to support its conclusion that advanced services require "greater network integration" than interLATA voice telecommunications is the fact that the local loop "is used to provide both telephone exchange services and advanced services." Of course, the loop is also used for both local exchange services and interLATA voice services, so this purported "distinction" is simply irrelevant.

[27] Again, detection and deterrence under Bell Atlantic's proposal are rendered all the more difficult by the absence of transaction disclosure or audit requirements.

several ways. For example, paragraph 3 of the merger conditions contains numerous exceptions that would permit Bell Atlantic to discriminate in favor of its affiliate for six months in the transfer of advanced services equipment, facilities, and personnel; in the use of names and trademarks; and for a full year in the provision of certain maintenance and repair reports and services. See SBC/Ameritech Merger Order, App. C, ¶¶ 3.e, 3.f, 3.h. Paragraph 3.e of the conditions is especially troubling, as it would allow Bell Atlantic to transfer "any Advanced Services Equipment, including supporting facilities and personnel" on an exclusive basis. This last provision would violate not only section 272(c),[28] but also the Commission's own rule against transfers of "unique facilities."[29] While a particular piece of Advanced Services Equipment, such as a DSLAM or a splitter, might be available for purchase elsewhere, when such equipment is transferred *in situ* -- e.g., already collocated in a BOC's central office and interconnected with that BOC's facilities, it is by any reasonable measure "unique," as a CLEC can replicate it, if at all, only after going through a months-long collocation process.

Transaction disclosure: In addition, the merger conditions expressly waive the transaction disclosure requirements of section 272(b)(5). See SBC/Ameritech Merger Order, App. C, ¶ 3(i). Instead of demanding disclosure of each transaction between Bell Atlantic and its advanced services affiliate, the merger conditions would permit Bell Atlantic merely to disclose the terms of an interconnection agreement that it "negotiates" with its wholly-owned affiliate. Because the affiliate and Bell Atlantic have a complete unity of interests, no interconnection

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[28] See Non-Accounting Safeguards Order, ¶ 160 (section 272(c)(1) dictates that "a section 272 affiliate and its interLATA competitors will have to follow the same procedures when obtaining services and facilities from a BOC").

agreement between them can possibly be the product of true arms' length negotiation, nor does the affiliate have any incentive or duty to maximize its own profitability or efficiency.[30] Moreover, the affiliate (unlike CLECs) will have no reason to seek to precisely specify the terms on which it will receive goods or services from Bell Atlantic.[31] These conditions' reliance on an interconnection agreement will provide both CLECs and the Commission with far less information than would the more stringent requirements of section 272(b)(5), and will substantially undermine the ability of CLECs to determine whether they are receiving goods, services, and information from Bell Atlantic on the same terms and conditions as is the new affiliate.

Joint marketing: The scope of the so-called "joint marketing" permitted by Paragraph 3.a of the SBC/Ameritech conditions is broader than that permitted by section 272(g), because the conditions permit the BOC and its affiliate to share, on an exclusive basis, "customer care" functions. Paragraph 3.a expressly provides that "customer care" includes functions that occur after a sale is made. But no reasonable construction of the term "marketing" includes post-sale activities. Dictionary definitions of "marketing" limit the term to "activity involved in the moving

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[29] See Non-Accounting Safeguards Order, ¶ 218 ("[W]e find that if a BOC were to decide to transfer ownership of a unique facility . . . to its section 272 affiliate, it must ensure that the transfer takes place in an open and nondiscriminatory manner.")

[30] "In the parent and wholly-owned subsidiary context . . . the directors of the subsidiary are obligated only to manage the affairs of the subsidiary in the best interests of the parent and the parent's shareholders." D. Block, N. Barton, & S. Radin, The Business Judgment Rule: Fiduciary Duties of Corporate Directors, at 185 (4th ed., Prentice Hall 1994) (citations omitted).

[31] Although paragraph 5.a of the SBC/Ameritech conditions states that the interconnection agreement between a BOC and its affiliate "shall be sufficiently detailed to permit telecommunications carriers to exercise effectively their 'pick-and-choose" rights under 47 U.S.C. § 252(i)," nothing in the conditions specifies the level of detail that will be required, and it is unclear how this largely hortatory provision could be enforced.

of goods from the producer to the consumer," and do not refer to activities that occur after goods reach a purchaser's hands.[32]

Sunset: All aspects of Bell Atlantic's proposal would sunset on July 1, 2003 (Bell Atlantic Dec. 10th Letter, Att. ¶ 13). In contrast, the sunset provisions of section 272 expressly exclude section 272(e), which is *not* subject to sunset. 47 U.S.C. § 272(f)(1) & (2).

Audit requirements: Finally, by refusing to commit even to all of the conditions in the SBC/Ameritech merger order, Bell Atlantic has distanced itself even further from section 272. For example, the merger conditions exempt SBC/Ameritech from section 272(d)'s audit requirements, but paragraphs 66 and 67 of the conditions at least imposed some audit obligations on SBC/Ameritech. Because Bell Atlantic will commit only to the conditions in paragraphs 1-14, however, it will escape any audit obligation whatsoever, thus further insulating the transactions between the affiliate and parent from any meaningful oversight.[33]

These examples are not exhaustive, but they demonstrate that Bell Atlantic is not willing to commit to sufficient separation safeguards between itself and its proposed data affiliate. The Commission has already determined that BOCs are inherently incapable of creating nondiscriminatory access to operation, installation, and maintenance functions, and the absence of any transactional disclosure or audit requirements will only increase Bell Atlantic's ability to discriminate. Coupled with the absence of any meaningful commitments to OSS parity, Bell

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32 Webster's New World Dictionary (1984).

33 In addition to the issues noted above, the SBC/Ameritech merger conditions employ a definition of "advanced services" that is radically different from that the Commission adopted earlier this year in a proceeding that expressly sought to define "advanced services" for purposes of administering the portions of the Act in which that term appears. AT&T explained this issue in its previously-filed comments on the advanced services portion of the SBC/Ameritech conditions, which are included with this *ex parte* as Attachment 4.

Atlantic's proposal cannot be viewed as a serious attempt to create an entity that could fairly be deemed a separate CLEC, rather than a successor or assign of Bell Atlantic. These inadequacies provide yet another reason for this Commission to disregard Bell Atlantic's belated data-affiliate proposal.

CONCLUSION

For the reasons stated above, the Commission should give no weight to Bell Atlantic's belated expression of willingness to establish an advanced services affiliate.

ATTACHMENT 1

September 21, 1999

[redacted]
Dallas, Tx 75209

Dear Mr. [redacted]

We regret to inform you that we will have to disconnect the ADSL from your line September 28th if we do not hear from you by that date. We would be glad to welcome you back with Southwestern Bell to enable us to continue to provide the ADSL service.

Sincerely,
Sandy
1 888 [redacted]

Southwestern Bell Telephone
[illegible] Avenue Q, Room [illegible]
Lubbock, Texas 79411

[redacted]

PRESORTED
FIRST CLASS

U.S. POSTAGE

Ms. [redacted]

Dallas, Tx 75209

AUTO 75209 [redacted]

ATTACHMENT 2

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Deployment Of Wireline Services Offering	)	CC Docket No. 98-147
Advanced Telecommunications Capability	)	

COMMENTS OF AT&T CORP.

Pursuant to the Revised Public Notice released on August 12, 1998, AT&T Corp. ("AT&T") respectfully submits these comments on the Commission's Notice of Proposed Rulemaking ("NPRM") regarding rules the Commission may adopt to encourage competition in, and timely deployment of, advanced telecommunications capabilities.

INTRODUCTION

The NPRM requests comment on a range of proposals that seek to "stimulate competition" for advanced telecommunications services and to "ensure that the marketplace is conducive to investment, innovation, and meeting the needs of consumers" for such services.[1] This is an important proceeding, because the rapid pace of technological development in telecommunications means that at least some of what are today considered "advanced services" could soon become commonplace and widely used by consumers. The rules adopted here will play a significant role in shaping whether and to what extent that occurs, for while it is ultimately

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[1] Memorandum Opinion And Order, And Notice Of Proposed Rulemaking, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, FCC 98-188 ("NPRM"), ¶¶ 1-2 (released August 7, 1998).

the investments and choices made by private actors -- consumers and industry participants -- that will determine how the marketplace evolves, the nature of their options and the decisions they make will be heavily influenced by the regulatory framework under which they proceed.

AT&T agrees with the Commission that the 1996 Act establishes the "blueprint" for the rules it should adopt.[2] The fundamental challenge in fostering a competitive marketplace in telecommunications is the same for advanced services as for other services: the control exercised by incumbent monopolists over essential inputs needed by all potential competitors. The unbundling, collocation, resale, and other market-opening measures of the Act address that challenge by creating a framework in which those inputs must be shared among all entrants on nondiscriminatory terms. Those provisions, and the Commission's existing local competition rules, embody the principles that should be applied here.

AT&T therefore strongly supports the Commission's effort to refine its local competition rules to address the specific issues that arise in connection with competition in the provision of advanced services. The existing rules already provide a strong foundation for this proceeding, and they should now be supplemented both to address issues that have arisen since their adoption and to specifically address their application to advanced services. AT&T's comments describe some of the ways in which those rules should be clarified or modified in order to achieve the objectives of this proceeding. Further, because many of these services are still in the early stages of development, the Commission should initiate a follow-on rulemaking proceeding in another eighteen months to assess how well the rules it adopts here are working

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[2] Id., ¶ 1.

and determine what further modifications are necessary in light of the knowledge that will be gained in the intervening months.

These comments are divided into six parts. Part I addresses the NPRM's proposal to permit ILECs to establish advanced services affiliates that would be exempted from the requirements imposed by the 1996 Act on incumbent LECs. The safeguards and separation requirements the NPRM proposes are necessary, but far from sufficient, to render an ILEC affiliate sufficiently separate to escape treatment as an ILEC pursuant to § 251(h). Although the NPRM seeks to rely on § 272 as its model, Congress did not intend that section to serve as the measure of an affiliate's status as an "incumbent." Moreover, § 272 permits BOCs to provide in-region interLATA services via a separate affiliate only after those ILECs have irreversibly opened their local exchange markets to competition in accordance with the rigorous criteria of § 271. In stark contrast, the NPRM proposes to permit ILEC affiliates to operate during a period when an ILEC's market power is unabated. Even if it were otherwise proper to rely on § 272 in this context, the BOCs have openly flouted the Commission's rules implementing that section, and there is thus no reasoned basis to conclude that those regulations can prevent ILECs from engaging in anticompetitive activities in conjunction with their advanced services affiliates.

In order to deem an advanced services affiliate "truly separate" from its ILEC parent, the Commission must strengthen and expand the requirements the NPRM proposes. The Commission should require that such affiliates have a meaningful quantum of outside ownership in order to deter an ILEC from operating a wholly-owned affiliate in a manner that simply maximizes the ILEC's own profits, while squeezing out competitors. In addition, the Commission should, among other things, (1) impose specific and meaningful transaction disclosure requirements on ILECs and their advanced services affiliates; (2) bar advanced services affiliates

from offering services via resale; (3) prohibit advanced services affiliates from entering into virtual collocation arrangements with affiliated ILECs; (4) prohibit any transfer of network elements from an ILEC to its advanced services affiliate; and (5) require ILECs to warrant, before providing any UNE to an advanced services affiliate, that CLECs can obtain, on the same terms and conditions as the affiliate, the same intellectual property rights associated with the UNE that the affiliate uses.

Part II recommends that the Commission supplement its existing loop rules to foster nondiscriminatory access to loop facilities for the provision of advanced services. Specifically, AT&T proposes additional rules and policies to (1) supplement the existing loop definition, (2) establish presumptions for loop performance, (3) specify further requirements for nondiscriminatory access to operations support systems ("OSS"), (4) address the potential for use of "spectrum management" claims to impede competition, and (5) clarify its existing rules on interconnection and unbundling of network elements in a remote terminal configuration.

Part III addresses the additional collocation rules that the Commission should adopt to address practices that ILECs have followed that serve only to impose added costs and obstacles to entrants seeking to compete. In particular, the Commission should (1) expand the types of equipment that new entrants must be permitted to include in collocation space, (2) expand the types of collocation arrangements that should be available to new entrants to include additional options, such as cageless collocation, and (3) take steps to maximize the space available for collocation.

Part IV responds to the Commission's inquiry whether its unbundling rules should be modified to consider additional factors in determining what network elements must be made available, and explains that no such modifications are necessary. It is appropriate, however, to

clarify the existing rules regarding intellectual property. As the comments explain, ILECs have claimed that their network elements contain the intellectual property of third party vendors and therefore cannot be provided on a nondiscriminatory basis, and have denied their obligation to obtain any licenses that might be necessary to enable them to comply with their nondiscrimination obligations. This is an obstacle to competition both for advanced services and for other services. The Commission should confirm, either in this proceeding or in the separate proceeding on this subject initiated by MCI, that it is the ILECs' obligation to obtain any necessary licenses.

Finally, Parts V and VI address the Commission's proposals for "targeted interLATA relief" and resale. Part V explains why it would be neither lawful nor sound policy to grant what would amount to piecemeal waivers of § 271 by modifying LATA boundaries in the manner suggested by the NPRM. Part VI supports the Commission's conclusion that advanced telecommunications services are fully subject to the resale obligations of § 251(c)(4).

I. THE NPRM'S PROPOSED SEPARATION REQUIREMENTS SHOULD BE EXPANDED AND STRENGTHENED.

A. The NPRM's Proposed Separation Requirements Are Inadequate To Support A Finding That An Advanced Services Affiliate Is Not An ILEC "Successor Or Assign" Pursuant To § 251(h).

The NPRM seeks comment on the Commission's conclusion that a "truly separate" ILEC advanced services affiliate, which "function[s] just like any other competitive LEC and [does] not derive unfair advantages from the incumbent LEC," would not be within § 251(h)'s definition of an "incumbent local exchange carrier," and therefore would not be subject to the

interconnection, unbundling, and resale obligations of § 251(c).[3] AT&T agrees that an affiliate that is sufficiently separate from an ILEC parent could in some circumstances escape treatment as a "successor or assign" of the ILEC under § 251(h)(1). However, the separation requirements and safeguards the NPRM proposes are not adequate to permit an advanced services affiliate to be deemed a non-ILEC.

1. Section 251(h)'s definition of ILEC to include "successors or assigns" should be given its naturally broad meaning so as to effectuate the market-opening goals of sections 251 and 252.

On its face, § 251(h) is unmistakably broad in its reach. That section defines "incumbent local exchange carrier" to include not only LECs that were deemed to be members of the exchange carrier association under 47 C.F.R. § 69.601(b) when the 1996 Act was enacted, but also any entity that becomes a "successor or assign" of such carriers.[4] The Commission also has sweeping authority to treat "comparable" local exchange carriers as ILECs,[5] clearly indicating that Congress intended the unique restrictions and obligations applicable to incumbent LECs to be applied in a sufficiently flexible manner to accomplish the 1996 Act's core purpose of opening local markets to competition. No reasonable reading of the plain language of § 251(h) can exclude from its scope a 100%-owned subsidiary of an ILEC (or an ILEC's parent) that provides local exchange or exchange access services within the ILEC's territory.[6]

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3 NPRM, ¶¶ 87, 92, 94.

4 47 U.S.C. § 251(h)(1).

5 47 U.S.C. § 251(h)(2).

6 Congress' understanding of the broad reach of "successor or assign" is evident in the Act's definition of "Bell Operating Company," which similarly includes "successors or assigns"

(footnote continued on following page)

Ultimately, as the Commission recognizes, the phrase "successor or assign" is not capable of a single definition. Instead, a determination of its meaning "must be based on the facts of each case and the particular legal obligation which is at issue."[7] In the case of § 251(h), the Commission's determination must be based on the purposes of sections 251 and 252 and on the legal obligations they impose.

The core purpose of sections 251(c) and 252 is to open the local exchange market to competition by mandating that ILECs give CLECs nondiscriminatory access to their monopoly-controlled bottleneck local exchange networks. By receiving such open, nondiscriminatory access, CLECs can compete directly against the ILEC in the local exchange and exchange access market using parts of the ILEC's own network, either by using UNEs or by reselling ILEC services. The determination whether an ILEC affiliate is sufficiently separated from an ILEC so as not to be deemed a "successor or assign" necessarily must focus on the impact particular separation requirements would have on the market-opening goals of sections 251 and 252. As the Commission already has found, there is no legal or technical basis to distinguish between local exchange or exchange access services and "advanced services," and the technologies used for advanced services are fully capable of transmitting voice

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(footnote continued from previous page)

> of the BOCs. The 1996 Act defines BOC so as to expressly exclude BOC affiliates that do not provide wireline services, which companies Congress plainly understood would otherwise be deemed BOC "successors or assigns." In contrast, the Act's definition of ILEC does not contain a similar limitation, reflecting Congress' intent to subject a broader array of carriers to the obligations of sections 251(c) and 252.

7 NPRM, ¶ 104, n.202 (internal quotation omitted).

communications.[8] Thus, the Commission's determination of the separation requirements necessary to ensure a "truly separate" affiliate cannot rest on the fact that the affiliate provides advanced services rather than (or in addition to) other forms of local exchange and exchange access. Instead, the Commission must use the same rigorous standards that would apply if an ILEC sought to establish an affiliate exempted from § 251(c) simply for the purpose of providing ordinary local POTS service within the ILEC's monopoly service territory.

2. Section 272's separation requirements are necessary, but not sufficient, to ensure that an ILEC advanced services affiliate is "truly separate."

The NPRM's proposed advanced services affiliate is modeled on the separation requirements imposed on certain BOC affiliates by § 272. While the § 272 restrictions represent necessary conditions that any ILEC affiliate should meet in order to fall outside the ambit of § 251(h), those requirements are by no means sufficient to ensure separation so complete that an advanced services affiliate functions "like any other competitive LEC," and derives no "unfair advantages from the incumbent LEC."[9] First, § 272 simply was not intended to outline the criteria necessary to escape treatment as an ILEC. Second, even to the extent that § 272 is pertinent to the NPRM's inquiry, that section was intended to permit a BOC to operate a separate affiliate only after a BOC had opened its local market to competition by fully satisfying the rigorous requirements of § 271.

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[8] Id., ¶¶ 35-37, 40-44.

[9] Id., ¶ 87.

a. Section 272 was not intended as a means to determine whether an affiliate is an ILEC pursuant to § 251(h).

Although § 272 provides important guidance for the NPRM's attempt to outline separation requirements, the 1996 Act does not provide that an affiliate that satisfies § 272 is not an ILEC pursuant to § 251(h). The Non-Accounting Safeguards Order[10] nowhere found that a BOC affiliate that satisfied the § 272 requirements would be deemed a non-ILEC. Rather, in that Order the Commission affirmed the broad reach of § 251(h) by holding that the transfer from a BOC to any affiliate (including non-§ 272 affiliates) of any network element subject to the unbundling requirements of § 251(c)(3) will cause that affiliate to deemed an "assign" of the BOC.[11]

As the Commission recognized in its Non-Accounting Safeguards Order, sections 251 and 272 have "different underlying purposes."[12] Congress tailored the § 272 requirements to reduce the risks that a BOC entering the interLATA market would use its market power over local exchange facilities to undermine competition.[13] There is simply no basis to presume that the § 272 requirements can -- or that Congress intended them to -- serve § 251(c)'s separate purpose to "ensure that ILECs do not discriminate in opening their bottleneck facilities

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10 Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, 11 FCC Rcd 21905 (1996) ("Non-Accounting Safeguards Order").

11 See 47 C.F.R. § 53.205; Non-Accounting Safeguards Order, ¶ 309.

12 Non-Accounting Safeguards Order, ¶ 205.

13 See id., ¶ 206.

to competitors."[14] This purpose, of course, includes permitting competitors to access ILECs' networks in order to provide both traditional and advanced services.[15] Congress enacted both sections 251(c) and 272 in the 1996 Act, and applied each to different classes of ILECs in order to accomplish different goals. The Commission is not at liberty to rewrite the Act by substituting one of its provisions for another.

b. Section 272 permits BOCs to operate in-region interLATA affiliates only after they have opened their local markets to competition by, *inter alia*, fully complying with § 251(c)(3).

Section 272 permits the BOCs to operate in-region interLATA affiliates only after the Commission finds that the local exchange market in a particular state has been fully and irrevocably opened to competition pursuant to the requirements of § 271. In stark contrast, the NPRM's proposed advanced services affiliate would be allowed to commence operations within its ILEC parent's monopoly territory even though the ILEC's market power is unabated. Congress envisioned that § 271 would foster vigorous competition in the local exchange market, which would work in conjunction with the § 272 requirements to constrain a BOC's ability to abuse its market power. Under the NPRM's proposal there would be no such competitive

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[14] Id., ¶ 205. In addition, the Act lists different separation requirements for BOC affiliates engaged in manufacturing (§ 273) and electronic publishing (§ 274), and the Commission has made clear that each of these sections imposes independent and distinct obligations on BOCs entering those fields. The Commission has even gone so far as to hold that the phrase "operate independently" in § 272(b)(1) should not be read to impose the same obligations as "operated independently" in § 274(b). See id., ¶ 157. The Act therefore provides no basis to conclude that an ILEC affiliate may be deemed a non-ILEC under § 251(h) by complying with only the separation requirements of § 272.

[15] See, e.g., NPRM, ¶ 57 ("all equipment and facilities used in the provision of advanced services are network elements" subject to § 251(c)).

restraints on an ILEC advanced services affiliate. It is beyond serious dispute that no ILEC has yet fully complied with § 251(c)(3) or the other market-opening provisions of the 1996 Act. Accordingly, while the § 272 safeguards provide a useful starting point, they plainly are inadequate to permit an ILEC affiliate to be treated as a non-ILEC.

c. The Commission's § 272 rules are largely untested and have been openly flouted by the BOCs.

Because no BOC has been authorized to provide in-region interLATA service pursuant to § 271, the Commission has no record as to whether its § 272 rules effectively deter and detect anticompetitive conduct.[16] In addition, as Commissioner Tristani observed in connection with the current proceeding, "state commissions have not had a full opportunity to evaluate the idea of separate affiliates and to advise [the Commission] of their views."[17]

Indeed, the evidence the Commission does have to date strongly suggests that its existing § 272 regime is patently inadequate to deter BOC misconduct. The records compiled in the five § 271 applications brought before the Commission to date clearly demonstrate that the BOCs are both willing and able to evade -- or openly defy -- § 272's requirements.

To take the most obvious example of the BOCs' blatant refusal to comply with federal law, the BOCs continue to assert that they are not subject to § 272 until they have been

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16 Further, the Commission's Non-Accounting Safeguards and Accounting Safeguards Orders are currently subject to petitions for reconsideration contending that § 272 requires the Commission to significantly strengthen its rules interpreting that section. See, e.g., AT&T Petition For Reconsideration, filed February 20, 1997, at pp. 3-4, in Non-Accounting Safeguards Order (contending, inter alia, that Commission's rules are inconsistent with the plain language of § 272(b)(1)).

17 NPRM, Statement of Commissioner Tristani, at 2.

granted interLATA authority,[18] a position that completely disregards the Commission's ruling in the August 1997 Ameritech Michigan Order that the § 272 restrictions and safeguards have applied to the BOCs since the 1996 Act's date of enactment.[19] The BOCs have not requested that the Commission reconsider its conclusion as to § 272's effective date; rather, they have defiantly stated that they simply do not intend to comply with the law.[20]

The BOCs similarly have refused to comply with the unequivocal requirements imposed in the Accounting Safeguards Order[21] -- and reiterated in the Ameritech Michigan Order[22] -- that they disclose all transactions with their affiliates and that they provide detailed

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18 E.g., Brief in Support of Second Application by BellSouth for Provision of In-Region, InterLATA Services in Louisiana, CC Docket No. 98-121, Appendix A, Tab 4, Cochran Aff. ¶¶ 9,21 (filed July 9, 1998); Brief in Support of Application by SBC for Provision of In-Region, InterLATA Services in California, Calif. PUC, R.93-04-003, I.93-04-002, R.95-04-044, at 69, 71 (filed March 31, 1998) ("[T]he 1996 Act does not require Pacific Bell to satisfy the disclosure requirements of section 272(b)(5) prior to receiving authorization ... ."); see also Investigation into U.S. West Communications, Inc.'s Complaint with Section 271(c) of the Telecommunications Act Of 1996, Montana PSC, Docket No. D97.5.87, Rebuttal Testimony of T. Million, U S WEST, at 11 (filed July 31, 1998) (stating that transactions will be posted on U S WEST's Internet Home Page only "upon approval of U S WEST LD as a Section 272 affiliate").

19 Memorandum Opinion and Order, Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, As Amended, to Provide In-Region, InterLATA Services in Michigan, 12 FCC Rcd 20543 (August 19, 1997), ¶ 371 ("Ameritech Michigan Order").

20 Of course, even to extent that a BOC seeks reconsideration of a Commission decision, the Communications Act provides that it is nevertheless bound to comply with the provisions it challenges. See 47 U.S.C. § 405.

21 Report and Order, Accounting Safeguards Under the Telecommunications Act of 1996, 11 FCC Rcd 17539 (1996) ("Accounting Safeguards Order"), ¶ 122.

22 Ameritech Michigan Order, ¶¶ 367, 369-370.